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Family Law

JURISDICTION IN SUITS FOR NULLITY OF MARRIAGE

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THE LAW COMMISSION

SECOND PROGRAMME - ITEM XIX

FAMILY LAW

JURISDICTION IN SUITS FOR NULLITY OF MARRIAGE

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WORKING PAPER

on

Jurisdiction in Suits for Nullity of Marriage

INTRODUCTION

1. Item XIX of our Second Programme, requires us to undertake a comprehensive examination of family law with a view to its systematic reform and eventual codification. In our Working Paper No. 28, *Jurisdiction in Matrimonial Causes* (other than Nullity), we reviewed the law relating to jurisdiction in most matrimonial causes. We left for later consideration jurisdiction in relation to nullity and declarations as to status. These, as it seemed to us, raised somewhat different considerations if only because the application of rules of foreign law could not be wholly excluded. The grounds for, and defences to, a suit for divorce or judicial separation can, and, as we proposed in Working Paper No. 28, should be governed exclusively by English domestic law. This, however, is not possible where the object of the suit is, as in nullity or some types of declaratory order, to determine whether a married state has ever been created. If the marriage has been celebrated abroad the validity of the marriage qua formalities must, almost inevitably, depend upon the law of the place of celebration.. If the parties are foreigners their personal law (whether that be regarded as the law of their domicils or the law of their nationality) can hardly be ignored in deciding whether they have capacity to marry or to marry each other.

2. The object of this Paper is to explore the question of when the English courts should have jurisdiction to annul a marriage. If decisions on this can be reached it will be possible to undertake a much needed consolidation of the legislation relating to matrimonial causes, legislation which is at present to be found in the Matrimonial Causes Acts of 1965 and 1967, as amended, the Divorce Reform Act 1969, the Matrimonial Proceedings and Property Act 1970 and the Nullity of Marriage Act 1971. We leave for later discussion in a separate Paper

the difficult question of what foreign law should be chosen to determine questions regarding the validity, formal and essential, of marriages which, because of some foreign element such as the place of celebration or the parties' domicil, cannot be governed exclusively by English domestic law. We also leave for the moment the question of jurisdiction in relation to declarations as to status. The present law relating to declarations, including in particular the relationship between proceedings under Order 15, rule 16 and those under section 39 of the Matrimonial Causes Act 1965, is in need of comprehensive review. The jurisdiction in relation to declarations cannot be sensibly considered until this is done. We therefore propose to deal in a separate Working Paper with the sort of declarations as to family status which should be made in the Family Division, and with the jurisdiction of the English courts to make such declarations.

3. In approaching the question of jurisdiction in nullity two considerations, analogous to those which formed the basis for our proposals in Working Paper No. 28, appear to us to be relevant. These are:-

(a) The fact that, in the eyes of English law (including its rules of conflict of laws leading to the application of a foreign law), a marriage is invalid should not in itself be sufficient to confer upon the English courts jurisdiction to annul it or to make a declaration that it is void.

(b) As in the case of divorce, a decree of nullity is a judgment in rem which binds not merely the parties to it but, in the eyes of English law, all the world and thereby finally determines the status of the parties in a way which affects third parties also. Hence, the English courts should not give such a judgment unless the parties are sufficiently connected with England to make it right and proper for the English courts

to make a universally binding decision on their status. A further reason for requiring a connection with England is that the court can order a party to make financial provision and can grant other ancillary relief on making a decree of nullity.

PRESENT LAW

4. A decree of nullity may be one of two types. It may affirm that the marriage in question was void ab initio, or it may annul a marriage which previously was voidable. The practical difference is that in the former case the marriage, being void, can be disregarded without any court order being necessary, whereas in the latter the marriage is valid until formally annulled at the suit of one of the parties. As a result of the Nullity of Marriage Act 1971[1] there is a clear-cut distinction between these two classes in all cases where English domestic law governs the validity of the marriage. Section 1 of the Act states the grounds on which a marriage is void;[2] section 2 the grounds on which it is voidable.[3] Furthermore, a decree annulling a voidable marriage will, in future, annul it as from the date of the decree and not retrospectively.[4] But section 4(1) provides that where the validity of a marriage would fall to be determined by reference to a foreign law the Act does not preclude the determination by such foreign law. In other words, the question whether a marriage is void, voidable or wholly

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1. This implemented our Report on Nullity of Marriage (Law Com. No. 33).
2. I.e., because the parties are within the probibited degrees or under age, because essential formalities of the Marriage Acts 1949 to 1970 were not observed, or because one party was already married to another or because the parties were not of opposite sexes.
3. I.e., because of incapacity to consummate, wilful refusal to consummate, absence of consent, mental disorder, venereal disease, or pregnancy by another man.
4. s. 5.

valid may still fall to be determined by a foreign law.

5. When the English courts make a decree of nullity, because the marriage is invalid, whether under English domestic law or under a foreign law, the decree operates as a universally binding decision as to the parties' status. This is so whether the marriage is regarded as void (in which case the decree conclusively determines an existing status) or whether it is regarded as voidable (in which case the decree conclusively changes the existing status). Moreover, in either case the courts can exercise the full panoply of powers to award financial and other ancillary relief with which they are vested by the Matrimonial Proceedings and Property Act 1970. In all these respects the effect of the decree is identical with that of a decree of divorce.

6. Nevertheless, the present grounds of jurisdiction in respect of divorce, on the one hand, and nullity on the other are totally different. In the case of divorce they are, at present, very restrictive; except as provided in section 40(1) of the Matrimonial Causes Act 1965, the parties must be domiciled in England at the institution of the suit. In the case, however, of nullity they are relatively lax. It appears that the English courts have jurisdiction:-

(a) where, at the institution of the suit, both parties[5] are or either[6] is domiciled in England,

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5. Salvesen v. Administrator of Austrian Property [1927] A.C. 641, H.L.

6. As regards petitioner's domicil, see White v. White [1937] P. 111 (as explained in De Reneville v. De Reneville [1948] P. 100 at 113, 117, C.A.); Mehta v. Mehta [1945] 2 All E.R. 690. As regards the respondent's domicil, there is no clear English authority, but see Ross Smith v. Ross Smith [1963] A.C. 280 at 323; Johnson v. Cooke [1898] 2 I.R. 130 and Aldridge v. Aldridge 1954 S.C. 58. And if, as appears, the respondent's residence suffices it would be anomalous if his domicil did not. Where the marriage is voidable only, the parties will necessarily have the same domicil since under English law a wife has the same domicil as that of her husband. Where the marriage is alleged to be void and the 'wife' petitions on the basis of her separate domicil there is the logical difficulty that her domicil depends on the very matter in controversy, viz., on whether the marriage is void or not, but the courts have been prepared to assume in her favour that she will establish her case: White v. White [1937] P. 111, and see Garthwaite v. Garthwaite [1964] P. 356 at 392, per Diplock L.J.

or where both parties[7] are or the respondent[8] is resident in England; or

(b) if the suit alleges that the marriage is void, where the marriage took place in England.[9]

In addition section 40(1) of the 1965 Act applies to nullity as well as to divorce so that the English courts also have jurisdiction in the case of proceedings by a wife:-

(a) where she has been deserted[10] by her husband or he has been deported and he was, immediately before the desertion or deportation, domiciled in England; or

(b) where she is resident in England and has been ordinarily resident there for three years immediately preceding the commencement of the proceedings and the husband is not domiciled in any part of the British Isles.

7. The reason for this marked difference between the grounds of jurisdiction for divorce and those for nullity is historical. Nullity (like judicial separation) was a remedy available in the ecclesiastical courts; divorce, in the sense of a total dissolution of marriage, was unknown. In 1857 matrimonial jurisdiction was transferred to the civil courts and, in all suits other than those for divorce, they were directed to

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7. Ramsay-Fairfax v. Ramsay-Fairfax [1956] P. 115, C.A.; Ross Smith v. Ross Smith [1963] A.C. 280 at 310, 317, 347-348, H.L.

8. Ross Smith v. Ross Smith, supra, at 323; Garthwaite v. Garthwaite [1964] P. 356 at 390. Residence of the petitioner alone does not suffice: De Reneville v. De Reneville, supra.

9. Simonin v. Mallac (1860) 2 Sw. & Tr. 67 (where, however, the marriage was really voidable); Sottomayor v. De Barros (1877) 3 P.D. 1; Linke v. Van Aerde (1894) 10 T.L.R. 426; Hussein v. Hussein [1938] P. 159; Hutter v. Hutter [1944] P. 95 at 102; Padolecchia v. Padolecchia [1968] P. 314. In Ross Smith v. Ross Smith, supra, the H.L. was equally divided on whether place of celebration suffices if the marriage was void; they held that it did not if the marriage was voidable.

10. It may be that this can have no application where the marriage is alleged to be void since if there is no marriage it is difficult to see how there can be legal desertion.

exercise it on the same principles as the ecclesiastical courts.[11] Those courts had assumed jurisdiction on the basis of residence. Hence, the civil courts did likewise. In divorce, a new remedy, the civil courts were free to lay down their own grounds of jurisdiction and they ultimately adopted the criterion of domicil.[12] The anomalous result is that, although the consequences as regards determination of status and the power to award ancillary relief are indentical, the grounds of jurisdiction are quite different.

PREVIOUS SUGGESTIONS FOR REFORM

8. The Morton Commission recommended that jurisdiction in nullity should vary according to whether the marriage was alleged to be void or voidable.[13] They thought that the grounds of jurisdiction in respect of a voidable marriage "should be governed as far as possible by rules similar to those which regulate the divorce jurisdiction of the court" because, "in its effect on the personal status of the spouses the annulment of marriage has the same effect as the dissolution of a valid marriage."[14] As regards void marriages, however, they would have provided far wider grounds of jurisdiction, namely domicil or mere presence of the petitioner.[15] In our view, this recommendation is unacceptable for two reasons:-

(a) it could give rise to the gravest practical difficulties;

(b) there is no adequate justification in principle for drawing any jurisdictional distinction between the two types of nullity or between them and divorce.

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11. Matrimonial Causes Act 1857, ss. 2 and 22. See now the Supreme Court of Judicature (Consolidation) Act 1925, s. 21.

12. This has been the accepted rule since Le Mesurier v. Le Mesurier [1895] A.C. 517, P.C.: see Law Com. No. 28, para. 15.

13. Report of the Royal Commission on Marriage and Divorce, 1956, Cmd. 9678, paras. 882 et seq.

14. Cmd. 9678, para. 892. But the Commission were not prepared wholly to assimilate the grounds of jurisdiction even in the case of voidable marriages: see para. 893.

15. ibid., para. 884.

(a) Practical difficulties of this solution

9. If suits for nullity were governed exclusively by English domestic law, there would, as regards future marriages, be little difficulty. As we have seen,[16] the Nullity of Marriage Act 1971 has, for the future, made it quite clear which grounds make a marriage void and which voidable. But this applies only to marriages taking place after the commencement of the Act (1 August 1971). As regards marriages celebrated earlier there is some doubt whether absence of consent always rendered a marriage void, or voidable only[17] (as under the Act).[18] Hence, if jurisdiction depended on whether the marriage was void or voidable there would be uncertainty for some time.

10. Where the question of the validity of the marriage depended on a foreign law the position would be far worse, especially in cases where the relevant law was that of one of many of the civil law countries. As we pointed out in our Report on Nullity of Marriage,[19] under the laws of these countries a marriage once formally celebrated cannot be disregarded until it has been set aside by a judicial decree.[20] Although many of such marriages would be described as void by lawyers of those countries,[21] they are not void according to

16. Para. 4 above.

17. See Tolstoy, (1964) 27 M.L.R. 385. The uncertainty is illustrated by the successive editions of Halsbury's Laws of England; in the first and second editions it was stated that lack of consent due to duress made a marriage void but the third edition (Vol. 12 at p. 225) states that it made it voidable.

18. Formerly, too, some types of mental incapacity rendered a marriage void, whereas others made it voidable only: see Matrimonial Causes Act 1965, s. 9(1)(b).

19. Law Com. No. 33, para. 4.

20. E.g., in Germany even a bigamous marriage cannot be disregarded without a decree: Cohn, Manual of German Law, Vol. I (2nd Ed. 1968) para. 487; see also Vol. II, (2nd Ed. 1971) para. 8.73.

21. Apparently, German lawyers would regard a bigamous marriage as 'void' despite what is said in footnote 20: ibid. Under Italian law (Civil Code, art. 128) a bigamous marriage is stated to be void but has the effect of a valid marriage, until formally annulled, with respect to any spouse who contracted it in good faith.

our test of whether they can be disregarded without a formal decree.[22] Strange consequences would ensue even as regards marriages governed by the rules of common law countries since the results might depend on the accidents of legal history, i.e., on whether English law was received there before or after the enactment of the Marriage Act 1835.[23] Hence, until recently in Australia a marriage of parties within the prohibited degrees was void in some States and voidable in others[24] and this is still the position as regards the different Provinces of Canada.[25] If the jurisdiction of the English courts to grant a decree of nullity depended on whether the marriage was void or voidable, the answer would depend on the particular State or Province in which the parties happened to be domiciled at the date of the marriage.

(b) Objections in principle

11. Apart from the practical difficulties of distinguishing, for jurisdictional purposes, between suits for nullity according to the grounds alleged and whether these grounds have the effect, under the relevant law, of making the marriage void or only voidable, there are, in our view, strong objections in principle to such a course. The essential effects of an English nullity decree are identical in both cases; it conclusively determines for all purposes and as respects all persons the status of

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22. Cf. De Reneville v. De Reneville [1948] P. 100, C.A. where jurisdiction depended on whether French law rendered the marriage void or voidable "in the sense of the words as understood in this country " (at p. 115).

23. Previously consanguinity or affinity rendered a marriage voidable.

24. Toose, Watson and Benjafield, Australian Divorce Law and Practice (1968) para. 97. See now the Matrimonial Causes Act 1959-1966, s. 20.

25. Power, Divorce (2nd Ed. 1964) pp. 195, 344. The recent Canadian (Federal) Divorce Act 1968 has not dealt with nullity.

the parties and it empowers the court to award financial provision, whether in the form of periodical payments, lump sums, or re-allocations of capital, and to make orders relating to the custody and maintenance of children of the family. In both these fundamental respects the effect of a decree of nullity is identical with that of a decree of divorce. In regard to one less important matter there is a difference between nullity of a void marriage and nullity of a voidable marriage (or divorce); in the latter the marriage is valid until annulled (or dissolved) at the suit of one of the parties whereas in the former the decree is declaratory of an existing state of affairs and can be made at the suit of anyone with a sufficient interest. This difference has become clear-cut as a result of the Nullity of Marriage Act 1971 which, as we have seen,[26] removes the vestiges of the retrospective effect of a decree of nullity of a voidable marriage,[27] thus making it identical in almost every respect with a decree of divorce. But these differences between the two types of nullity seem to us to be irrelevant for the purposes of determining whether the English courts should have jurisdiction. That, as we have said, should depend on whether the parties have a sufficient connection with England for it to be proper for the English courts to make a decree. That connection cannot, as we see it, reasonably differ according to whether the decree is retrospective or prospective, declaratory or operative. And as the essential consequences of any nullity decree are identical with those of a divorce, the connection ought, in our view, to be the same as that required to afford jurisdiction in divorce.

12. As we have seen,[28] in the case of a marriage alleged to be void the Morton Commission would have conferred jurisdiction

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26. Para. 4 above.

27. For the present position, see Law Com. No. 33, para. 22.

28. Para. 8 above.

on the English courts if the petitioner was either domiciled or merely present within the jurisdiction. They justified this on the ground that

> "if the question whether a marriage is void arises incidentally in other proceedings, there are no jurisdictional limitations upon the power of the court to make a declaration as to the nullity of the marriage, which will be binding on the parties themselves."29

To the objection that such lax jurisdictional criteria might lead to forum-shopping, they answered:

> "We do not think that applicants will travel specially to England ..... to take advantage of this jurisdiction because we are proposing that the court should look to the personal law of the parties for a determination of the issues, except those relating to an alleged lack of formalities. There would be no point in coming to England ..... if the remedy could be obtained from the court of the applicant's own country."30

13. We, however, are unable to accept either of these justifications for what would virtually be a total removal of any need for any genuine connection with England. The fact that the validity of a marriage can be determined as an incidental question in other proceedings so as to bind only those who are parties to the action seems to us to be no reason why our courts should be empowered to make decrees in rem which are binding on those who are not parties.[31] If, for example, the question arises whether X qualifies to take a legacy under an English will as 'the wife of Y', X will have to satisfy the personal representatives that she is married to Y. If they are in doubt they may refer the matter to the English courts which will have to determine the question, and their determination will be binding on the personal representatives, X and any beneficiaries who are made parties either directly or

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29. Cmd. 9678, para. 882.

30. ibid., para. 883.

31. The Court of Appeal in Garthwaite v. Garthwaite [1964] P. 356 took the same view: see especially per Diplock L.J. at 395, 396.

by representation. But the decision will not bind anyone else - not even X unless he is made a party. Nor should it. Only if X or Y has an adequate connection with England should our courts be entitled to make a final judgment in rem regarding the validity of the marriage. The second argument, that so long as the validity of the marriage is determined in accordance with the parties' personal law there would be no point in coming to England, ignores the fact that England is unusually generous in allowing financial relief to be awarded on the grant of a decree of nullity even if it is in respect of a void marriage. In Scotland there is no such power on the grant of any nullity decree and this has in fact led to attempted forum-shopping.[32] If a domiciled Scot merely had to cross the border in order to be able to petition in England, every wife whose marriage was void under Scottish law would petition in England if she wanted to claim maintenance.[33]

14. In our view, therefore, it is essential that the English courts should not have jurisdiction to grant a decree of nullity unless there is a sufficient connection between the parties and England. The mere presence or residence of one party should not suffice.

OUR PROVISIONAL PROPOSALS

15. In our Working Paper on Jurisdiction in Matrimonial Causes (other than Nullity) we reviewed at length the various considerations which, as we saw it, are relevant in deciding whether there is a sufficient connection with England to make it proper for the English courts to assume jurisdiction to dissolve a marriage.[34] Since, for reasons given above, precisely the same considerations are relevant in deciding whether the English courts should have jurisdiction to annul the marriage, we need not repeat what we said in that Working

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32. See, for example, Inverclyde v. Inverclyde [1931] P. 29; Ross Smith v. Ross Smith [1963] A.C. 280.

33. And, if a similar rule was adopted in Scotland (as the Morton Commission recommended), every English husband would petition in Scotland in order to avoid having to pay maintenance.

34. Working Paper No. 28, paras. 4-13.

Paper. Our provisional conclusions were that the English courts should have jurisdiction if either the petitioner or the respondent was at the institution of the proceedings

(a) domiciled in England, or

(b) resident in England and had habitually been resident in England during the preceding twelve months.[35]

We also proposed that for the purposes of all types of matrimonial relief (i.e., including nullity) the domicil of a wife should be determined independently of that of her husband[36] and that for all purposes the domicil of a minor who is or has been married should be determined as if he or she was an adult.[37] Finally, we proposed that the powers of the court to stay proceedings when suits are being pursued in two or more countries should be clarified and strengthened.[38] To this end we suggested an obligation to disclose in the petition all past or pending proceedings relating to the marriage whether in England or elsewhere - a suggestion which is now implemented in the revised Rules[39] - and that where proceedings relating to the marriage were pending elsewhere the court should stay the English proceedings if it considered that in all the circumstances it would be preferable for those other proceedings to be disposed of first.

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35. ibid., paras. 36-67 and 94. We proposed the same jurisdictional criteria in respect of judicial separation with, in addition, the respondent's residence at the commencement of the proceedings: ibid., paras. 86-88.

36. ibid., paras. 39-44 and footnote 30A.

37. ibid., paras. 45-47.

38. ibid., para. 68.

39. M.C.R. 1971 r. 9(1) and Form 2 (General Form of Petition) which requires disclosure of any "previous proceedings in any court in England or Wales or elsewhere with reference to the marriage ....."

16. Consultation on that Working Paper has revealed general support for the above proposals. The only respect in which any serious disagreement has been revealed is on whether twelve months' residence is sufficiently long; although many supported our proposal there were some who favoured two years and some three years. In our view, these proposals are equally applicable to jurisdiction in nullity. Whatever period of habitual residence is ultimately chosen, our provisional conclusion is that precisely the same jurisdictional criteria should apply to nullity (of both types) as to divorce. At present, as we have suggested,[40] the grounds of jurisdiction in nullity are, for purely historical reasons, excessively lax, whereas those for divorce are excessively strict. Unification on the lines proposed will provide a happy mean between laxity and strictness.

17. This proposal has the following practical advantages in addition to those of principle outlined above:-

(a) When a marriage has broken down it is sometimes desired to petition for nullity or for divorce in the alternative; for example, where the petitioner wishes to allege wilful refusal to consummate and desertion. So long as the jurisdictional criteria differ this may not be possible.

(b) The English courts will no longer be required to make a decree, binding on all the world, determining the marital status of the parties either by divorce or nullity, unless there is a substantial connection with England.

(c) A respondent having no connection with England will not be forced to defend a suit to dissolve or annul his marriage or run the risk of having financial orders made against him except where the other spouse has a substantial connection with England.

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40. Para. 7.

(d) Husbands and wives will be treated in the same way. At present their positions differ in two respects. A husband can choose where the domicil of both spouses should be, whereas, unless the marriage is alleged to be void, the wife has no choice. In future she will be able to retain or acquire an independent domicil for jurisdictional purposes whether her marriage is alleged to be void or voidable. At present the husband can petition only when he is domiciled here whereas the wife can do so on the basis of three years' residence. In future either will be able to petition on the ground of habitual residence for the required period as well as domicil.

18. Under this proposal it will no longer be possible to petition for nullity on the jurisdictional ground

(a) of residence alone (unless it has lasted for the prescribed period), or

(b) of celebration of the marriage in England where the marriage is alleged to be void.

As regards (a), we consider that residence, unless it has been for a reasonable period or unless coupled with an intention to establish a permanent or indefinite home so as to amount to domicil, should not be regarded as establishing an adequate connection. We argued this fully in relation to divorce jurisdiction in our Working Paper No. 28.[41] As regards (b), as already pointed out it is by no means certain that if the question went again to the House of Lords it would be held that the fact that the marriage was celebrated in England is sufficient to afford the English courts jurisdiction,[42] and it is clearly not sufficient in the case of marriages alleged to be

41. Paras. 48-66.

42. See para. 7, footnote 9, where it is pointed out that the House of Lords was equally divided on this point in Ross Smith v. Ross Smith [1963] A.C. 280.

voidable.[43] It has also been rejected as a sufficient ground for making a declaration of the validity of a marriage.[44] The only substantial argument for treating it as a ground of jurisdiction is that the voidness of the marriage may be due to lack of essential formalities (though it is as likely to be due to lack of capacity) in which event the resolution of the question will be governed by English internal law as the law of the place of celebration. But although it may be preferable that where the English courts have jurisdiction they should apply English internal law with which they are familiar, rather than a foreign law which may be wholly alien to English ideas, it by no means follows that because English law is to be applied the English courts should always have jurisdiction. If the parties' only connection with England is the fact that they went through a ceremony of marriage here, the connection is wholly past, far too slight and may be entirely fortuitous.[45] In Australia jurisdiction to annul a marriage on the sole ground that it was celebrated in Australia was expressly abolished in 1959.[46]

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43. Ross Smith v. Ross Smith, supra.

44. Garthwaite v. Garthwaite [1964] P. 356, C.A.

45. See, for example, Padolecchia v. Padolecchia [1968] P. 314, where two foreigners came to England for one day and married here and it was held that this conferred jurisdiction to annul the marriage. One additional argument raised in favour of the place of celebration was that "the country of celebration has a particular interest in correcting its civil registers" (at 335). In England, however, marriage registers are not corrected on the grant of a decree of nullity.

46. Matrimonial Causes Act 1959, s. 23(5).

Summary

19. The English courts should have jurisdiction in nullity, whether the marriage is alleged to be void or voidable, only in the same circumstances as they should have jurisdiction in divorce, namely when either the petitioner or respondent is, at the commencement of the proceedings

(a) domiciled[47] in England, or

(b) resident in England and has habitually been resident in England for twelve months[48] immediately preceding the commencement of the proceedings.

They should, nevertheless, stay proceedings if proceedings relating to the marriage are already taking place abroad and they consider that it would be preferable for those proceedings to be disposed of first (paras. 15-18).

47. A married woman or married minor being allowed to have an independent domicil for this purpose.

48. Or such longer period as may be decided upon in relation to divorce.